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The Law of Stare Decises: Ijthihad in Islam vs Institutionalized Taqlid in Pakistan

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Abstract
Different legal systems across the world reflect the great variance in States' historical and cultural experiences. A distinct system of law known as common law has been developed over lands over the period establishing the fundamental components of the common law system. Some legal scholars calls the birth of legal traditions a result of a historical accident. The doctrine of stare decisis became well established in common law. Under the doctrine of stare decisis, judges were bound primarily by precedents established by previous judgments.

Keywords: Ijtihad, Taqlid, Law of Sate Decises

Introduction

Different legal systems across the world reflect the great variance in States' historical and cultural experiences. A distinct system of law known as common law has been developed over lands over the period establishing the fundamental components of the common law system. Some legal scholars calls the birth of legal traditions a result of a historical accident. The doctrine of stare decisis became well established in common law. Under the doctrine of stare decisis, judges were bound primarily by precedents established by previous judgments.[1]
The birth of Islamic law is witnessed in the Arabian Peninsula and Mesopotamia in the seventh century A.D.[2] With the expansion of the Arab empire, Islamic religious and legal traditions became predominant in many Central Asian and Middle Eastern states. The detailed study of Islamic law shows that the Islamic legal tradition is primarily based on religious principles of human conduct, and law is an integral part of the Islamic religion.
The use of precedents when making legal judgments is prevalent in common law systems, but virtually absent in civil law or Islamic law systems.[3] My paper will

[1]Emilia Justyna Powell and Sara McLaughlin Mitchell, "The International Court of Justice and the World's Three Legal System" (May., 2007)69, No. 2, The Journal of Politics, 397-415 (Hereafter Powell ,The International Court)
[2] ibid
[3] Opolot, James S. E. '*An Analysis of World Legal Traditions'* (Jonesboro, TN: Pilgrimage Press 1980) 22 (Hereafter James, *An analysis.)*

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cover the use of precedents /stare decisis in common and Islamic legal systems whereas Islamic law is a legal system in its own right, and is very distinct from the civil and common law systems in the West.

Stare Decises and its Significance

Before highlighting the use of precedents in different legal systems, it is of utmost importance to know what is meant by stare decisis under different scholarly views and the value attached to precedents.

In most common sense the doctrine of precedent, or stare decisis, states that, when trying a case, a judge is obliged to examine how previous judges have dealt with similar cases.[4]It is to stand by that which is decided. In this process of looking back at the case, a judge discovers principles of law relevant to a case under consideration and renders judicial decisions consistent with existing principles in the law. Stare decisis is a legal principle which dictates that courts cannot disregard the standard. It signifies that when a point of law has been previously settled by a judicial decision, it forms a precedent and the precedent if established cannot be departed from afterward.[5] However it is crucial to note that common law countries may also have codified bodies of written legal rules, norms, and principles though many legal scholars highlight that the codes in common law nations more often summarize principles established beforehand in judicial decisions.[6]

There are number of advantages attached to the motif of stare decises. Among others, the main advantage attributed to the doctrine of judicial precedent is that it brings consistency in the application and creation of principles in each branch of law. To the common law lawyers, it enables them to forecast with some degree of certainty what kind of judgment may be expected in a particular case. However, an apparent conflict existed between the highest courts of England and the United States of America prior to 1966 on the question of what a judge should do if he or she is confronted with an unreasonable or outdated precedent. In Britain, the decision was made by House of Lords in 1898 that it was bound by its own decisions. On the other hand, the principle of stare decises has never been considered an absolute command, and the duty to follow a precedent is held to be qualified by the right to overrule prior decisions. The highest courts of the states, as well as the Supreme Court, posses the right to depart from a rule or principle previously established by them. The British interpretation on precedents, however, moved closer to the American view in 1966. It was established by the Practice Statement of the House of Lords that previous decisions of the House are treated by it "as normally binding," but this is subject to a right "to depart from a previous decision when it appears right to do so".[7] It is argued by some of the legal scholars that although formally present in the common law countries and absent in civil law nation, *stare decisis* does not constitute the most important disparity between the two systems.[8]

[4] Darbyshire, '*The English Legal System'* (7th ed. London: Sweet and Maxwell) 178 .

[5] James, *An analysis*.

[6]Merryman, John H. *The Civil Law Tradition*. (Stanford, CA: Stanford University Press 1969) 224

[7] Shahabuddeen, Mohamed, '*Precedent in the World Court*. (Cambridge: Cambridge University Press . 1996) 43

[8] Shapiro, Martin M, '*Courts: A Comparative and Political Analysis*' (Chicago: University of Chicago Press 1986) 112

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Use of precedents /stare decisis and Islamic Law

In contrast to the common law system, the civil law which is based on Roman ius civile does not establish the stare decisis doctrine as the law-making function is assigned to the legislature where the judge was to play a passive role, to implement legal rules contained mainly in codes, laws, and statutes.

The stare decisis doctrine is also absent in Islamic law systems in the form as is present in common law system. In Islamic legal systems, the four principle sources of law to be derived from are: the Qur'an (literally means 'the Reading'), the Sunna (the path taken or trodden" by the Prophet himself,), judicial consensus (a common religious conviction), and analogical reasoning (used in circumstances not provided for in the Qur'an or other sources).[9] These sources themselves serve as instructive stare decisis for entire ummah (followers) regarding the leading matters of interest that the provisions of the Qur'an and Sunna may be applied to a new problem if there exists a similar operative or effective cause.[10] but it denies any existence and strict application of the doctrine of stare decisis of pure common law system. For example, with no precedential proof and link in the sources of Islamic law, the modern means of electronic evidence, photography, and sound recordings as contemporary modes of proof, for example, gets validity from the Prophetic dicta.[11] The most fundamental law related to the accommodation of such useful means of proof and evidence, including forensic evidence, is founded in a hadith. Prophet Muhammad (p.b.u.h.), as part of his universal inauguration of Islamic judicial proceeding, declared that human technical knowledge and expertise, and not the revelation, are to constitute the foundation of evidence and proof.[12] This is clear from his famous dicta when Prophet said: "since I am only a human, like all of you, I might, when litigants come before me to decide between them, rule in favor of more eloquent of them. If I thereby transfer to him what is rightfully his brother's, I warn him to take not that which is not his, or I shall reserve for him a piece of Hell."[13] This hadith, therefore, among other guiding principles, declares that the matters of evidence and proof belong to human affairs free from any reference to precedential complexity and validate the authority for the admission of these novel methods of proof in Islamic law. In other words historical precedent in providing us with an undisputed legal framework in order "to modernize our judicial system by incorporating the forensic sciences into its apparatus, and to implement justice in the current environment of complex criminality and civil rights infringements."[14]

Brief Islamic Legal History and advent of precedents in 18thCentury Sub- Continent

Islamic legal history has been divided in to seven distinct periods/stages by legal

[9] Vago, Steven., *Law and Society* (Upper Saddle River,NJ: Pren-tice Hall 2000) 214

[10] Powell ,The International Court.

[11] Sayed Sikanadar Shah Haneef, Modern Means of Proof: Legal Basis for Its Accommodation in Islamic Law (2006)20 No. 4 , Arab Law Quarterly, pp. 334-364 (Hereafter Haneef, Modern means).

[12] ibid

[13] Ali ibn Umar al-Dar Qutni, Sunan al-Dar Qutni, Qairo: Dar al-Mahasin, 1966, vol. 4, p. 239.

[14] Haneef, Modern means.

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historians spread over the period from 610 CE to the present.
I stage starts with the revelation of prophet till his death (the 1st period, 13bh-11 ah/610-632).
II stage is spread over the period of companions who formulated a large number of legal principles whereas the decisions of prophetic period were treated as precedents (the 2nd period, 11-41/632-661).
III and IV stages of growth of Islamic law, that is, 41-132/661-749 and 132-350/749-961 respectively established various schools of thought adopting different methodologies for interpretation of Islamic law.
V stage, 350-8th-9th/961-14th century;
VI stage, 8th-llth/14th-17th century;
VII stage, llth/17th ? to the present.[15]
At the end of the eighteenth century, British judges in India used to refer to the Roman law formula of "justice, equity and good conscience." What they actually meant by this were British laws, "if they could be applied to the Indian society and circumstances"[16] though there were differing opinions as to its scope and whether it could supersede explicit Islamic norms. According to Warren Hastings when the administration of law seemed "repugnant to the principles of good government and common sense," the British should step in with a remedy."[17]As a result, at the end of the eighteenth century, the strong English presumption that they could "elevate" and raise up the standards of the colonized societies by extending to them more "humane" principle and norms. In the name of such moral reforms and aims, the East India Company increasingly played with religious beliefs and tenets of the natives. For instance in 1792, contrary to Islamic law, it was decided that Muslims could be convicted on the testimony of non-Muslims.[18] In the words of a British high official that the purpose the Raj, at the end of the eighteenth century was, after all to "preserve . . . the institutions and laws of the natives of Hindoostan, and attemper them with the mild spirit of British government"[19]structuring and shaping Islamic law into Anglo Muhammadan law.
The attempt to classify the Indian population into strict religious categories proved increasingly complex. This gave judges in some cases, typically concerning Khojas and Kutchi Memons, the chance to affirm that "litigants could be governed by customary law in derogation of textual Islamic law, though the existence of custom required very high standards of proof"[20] or "to choose between differing options by recurring to the formula of justice, equity of good conscience."[21] This reliance on precedents gave binding authority to the solutions adopted by the British judges.

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[15]Imran A. K. Nyazee, Outlines of Islamic Jurisprudence, 2nd ed. (Islamabad: Centre for Islamic Law & Legal Heritage, 2002), 349-358. (Hereafter Nyazee, Outlines of Islamic Jurisprudence)

[16] Tyabji, Faiz Badruddin, *Principles of Muhammadan Law* (Calcutta: Butterworth 1919) 74

[17] Misra, Bankey Bihari, *The Central Administration 1773-1834* (Manchester: Manchester 1959)324

[18]Elisa Giunchi, The Reinvention of "Sharīʿa" under the British Raj: In Search of Authenticity and Certainty, (November 2010)69, No. 4 The Journal of Asian Studies, 1119-1142 (Hereafter Giunchi, The Reinvention of)

[19] Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia" (May 2001) 35 Modern Asian Studies, 257.

[20] Jan Mohamed Abdullah Datu and others v. Datu ¡offer and others, AIR 1914 Bombay 59

[21] *Aziz Bano v. Muhammad Ibrahim Husein* (1925), 47 All., 823

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The British judges actually established the procedure of stare decisis and binding precedent, which was unfamiliar in Islam, although it had an apparent similarity to the principle of taqlid, the observance of one legal school at the exclusion of others.[22] However, "whereas taqlid had not stopped legal theory and legal practice from evolving, and it recognized contradictions within single judicial schools, the influence of precedent, accompanied by the reluctance to differ from established positions on religious matters and to accept fresh interpretations,[23] including those based on Islamic primary sources,[24] limited the flexibility that the judiciary had previously possessed to maneuver between different scriptural authorities and, within them, between different opinions."[25]

Doctrine of Ijtihad and Taqlid

Ijtihad carries two distinct meanings in Islamic literature and traditions. In its general sense, ijtihad is related to the expansion and renewal of Islamic law. While taking it in its more specific sense, Ijtihad is a juristic tool, a process of reasoning, used to interpret the Basic Code, that is, the Quran and the Sunna.'[26] Common in both its meanings, ijtihad guarantees that fiqh would continue to meet the needs of Muslim communities across the world and across time, solving their social, economic and political problems. Mujtahid, therefore, is a person who exercises his utmost effort to extract a rule from the subject matter of revelation while following the principles and procedures established in legal theory.[27]

The Quran testifies that God has elevated scholars over others.[28] Prophet declares that the scholar among believers is like the moon among stars.[29] The position of the jurist as the custodian of classical fiqh is more eminent and has a prestige over the position of qadi (judge) as a dispute solver. Many imminent jurists refused to become judges. For example Imam Abu Hanifa was thrown in prison for declining the caliph's offer to assume the office of the chief judge[30] to not lose his juristic freedom to interpret the Basic Code in complete honesty and without pressure.

The creative area of Jihad ended (632-874) and was followed by the long ten centuries of taqlid, that is, an era of strict precedents (875-1875). This period is measured from the death of Imam Muslim in 875 to the teachings of Jamal Abdal al-Afghani (1838-1897) who initiated the second era of ijtihad in 1875.[31] The door of ijtihad in this period was closed on the assumption that the

[22] Giunchi, The Reinvention of, 1122

[23] *Aga Mahomed Jaff er v. Koolsom Beebee* (1897), 25 Cal. 9, 496.

[24] Ibid ; and *Baqar Ali v. Anjuman* (1902), ILR 25 All., 236.

[25] Giunchi, The Reinvention of, 1122

[26] Ali Khan, The Reopening of the Islamic Code :The Second Era of Ijtihad accessed online http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1016&context=ustlj (Hereafter Khan, The reopening of)

[27] Wael B. Hallaq, A History of Islamic Legal Theory: An Introduction to Sunni Usul al Fiqh (Cambridge: Cambridge University Press, 1997; reprint, 1999) 117. (Hereafter Hallaq, A History of Islamic Legal Theory)

[28] Al, Quran 39:9; 58:11; 4:59; 35:28.

[29] Sunan Abu Dawud, Bk 25, Hadith no. 3634 (Trans. Ahmed Hasan).

[30] Charles Adams, Abu Hanifa: Champion of Liberation and Tolerance *in* Islamic Law and Legal Theory (ed. Ian Edge, 1996)386

[31] Fazlur Rahman, 'Islam' (University of Chicago Press 1979)123

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interpretation of the Basic Code had been completed and that classical fiqh needed no more
fundamental alteration or adjustment.[32] Wael Hallaq's work points out the theme of criticism of taqlid throughout Islamic history, as jurist after jurist pointed out its suffocating effects and his work highlights an already well-known point that the school-bound ijtihad did not cease to exist during this period.[33] His work, however, missed to disestablish the larger point that such was the force of taqlid that no new school of jurisprudence was successfully instituted (no new legal methods crafted to access the Basic Code).[34] Breaking no new ground in substantive law or legal methods, commentaries on taqlid did refine and shape the contents and methods of established schools, thus keeping the doctrine alive.
But the doctrine itself had lost creativity and boldness because the era of taqlid should be examined not as the end of interpretive law but as the end of creativity and imagination embodied in the concept of minhaj.[35]The closure of fresh reasoning is the most harmful effect of taqlid and strict formalism. One renowned jurist advises Muslims and perceives the core of formalism in the following way:
"When you have a question, ask only for the rule of the law (mas'alah) but do not ask for the basis on which the ruling is given (dalil)."[36]
The soundness of the advice is valid to the extent that persons who are not trained in law might fail to appreciate the force of reasoning behind the rule which will expose the rule to debate and doubt. The advice, however, also establishes the motif of strict precedents. The original dalil supporting the rule might no longer be relevant or valid but still, the rule continues to be binding which is the classical symptom of legal formalism and strict precedent.[37] "A legal system loses touch with reality whenever the reasoning process is abandoned, whenever the justification of the rule is automatically presumed, and whenever old rules are binding even if they fail to address the problems arising from changed social and economic conditions."[38]
Taqlid is closely related to Doctrine of bida. Doctrine of bida prohibits innovations and is claimed to be derived from the pronouncement of prophet that innovations in the faith are prohibited.[39] The doctrine of bida is based on the motif of strict prohibition and prevention to bring even minor changes, for example the length of the beard of man and eating with a fork or spoon. This ban on innovation has been extended to discourage any deviation from the social, economic, military and models of early Islam. Periodic attempts to erase innovations have been made to bring Islamic communities back in conformity with the classical Islamic era. The concept of bida, however, bears controversy because "probative evidence is available to support that good innovations that

[32] Joseph Schacht, 'An Introduction to Islamic Law' (1964) 70-71

[33] Wael Hallaq, Was the Gate of Ijtihad Closed? (1984) 16 Inter. J. Middle East

[34] Khan, The reopening of. 32

[35] Hallaq, A History of Islamic Legal Theory, 259

[36] Sajid A. Kaym, The Jammat Tableegh and the Deobandis, Chap. 12 (2001) accessed online http://www.ahya.org/tjonline/eng/contents.html

[37] Khan, The reopening of.

[38] Ibid

[39] Sahih Muslim, vol. 2, hadith no. 1885 (trans. Abdul Siddiqi).

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strengthen the faith are acceptable."[40]
The most powerful movement against bida is the so-called Wahhabism, which is attributed to the
teachings of Muhammad ibn Abd-al-Wahhab(1703-92), and practiced in the present-day Saudi
Arabia that has no role of doctrine of stare decisis in its legal system. It shook the foundations of taqlid and reform movement that sets the stage for the second era of ijtihad (1875-present) though is not encouraged in rest of Islamic world for detached from some constraints of classical fiqh.

Doctrine of Ijtihad and Stare Decises : Pakistan

As discussed above, the process of reasoning is known as ijtihad. It is also defined as the "effort made by the mujtahid in seeking knowledge of the ahkam (rules) of the Shariah through interpretation,"[41] and the "effort of the jurist to derive the law on an issue by expending all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue by the judge."[42] Thus the (illah) the underlying legal cause of a hukm (rule), in the previous case, its ratio decidendi, may be the same, on the basis of which the accompanying hukm (rule) is extended to other cases.[43] Ijtihad is the process for the derivation of the law. The result of the ijtihad is a source as it is the precedent required for later cases.[44]
Mujtahid cannot follow the ijtihad of others. Similarly, a mujtahid must never follow the opinion of a lesser mujtahid. A jurist is allowed to practice ijtihad in a particular branch of the law when he is unable to practice it in others[45] and he exercises an independent judgment.
In Muslim countries like Pakistan, ijtihad today is a legislative function because it lays down the law for the first time and monopoly over legislation is exercised by the State.[46]
Now if we take the case of Qadi, ijtihad is not a necessary condition for him as per Hanifi school of thought in contrast to the MalikI, the Shafi', and the Hanbali schools of law. The qadi, therefore, must follow his ijtihad in the absence of authoritative text or ijma.[47] Qadi must be a mujtahid: thereby, he is not allowed to follow the ijtihad of a fellow mujtahid/judge. It clarifies that under Islamic law a court is not bound by the decision of another court, irrespective of whether the latter court is of equal rank or higher in the hierarchal organization.
Everyone cannot be mujthahid and therefore taqlid is the foundation for the Islamic theory of adjudication and its purpose is to lay down a methodology for the faqih for discovering and applying the law in the light of the already settled

[40] Sahih Bukhari, vol. 3, hadith no. 227 (trans. Muhsin Khan).

[41] Nyazee, Outlines of Islamic Jurisprudence, 263

[42] Ibid, 395

[43] Ibid

[44] Ibid, 341

[45]Muhammad Munir, 'Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan , (Winter 2008) Vol. 47, No. 4 Islamic Studies pp. 445-482 472 (Hereafter Muhammad, Precedent in Islamic Law)

[46] Ibid, 472

[47]Abu Bakr b. Mas'ud al-Kasanl, The Unprecedented Analytical Arrangement of Islamic Laws, trans. Imran A. K. Nyazee (Islamabad: Advanced Legal Studies Institute, 2007) 33

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law.[48]

The law of binding precedent means that taqlid is institutionalized in Pakistan under the meaning of Articles 189, 201 and 203GG of the 1973 Constitution of Pakistan. A two-fold argument is raised by the unique merge of Pakistani law where precedent is binding on the one hand and Islamic law is enforced by the national courts on the other hand. Therefore the decisions of the superior courts concerning Islamic law become precedents. Similar to the superior courts in Pakistan which can overrule their own previous decisions, it is possible under Islamic law to overrule the decision by a different court later in time because a judge is supposed to be a mujtahid. Quran affirms the same by stating that;

"We have sent down the Scripture to you [Prophet] with the truth so that you can judge between people in accordance with what God has shown you."[49]

Reported is a hadith that says that the Prophet (peace be on him) said that "when a judge resorted to ijtihad and decided a case, then if his ijtihad is correct, he is rewarded twice; and if it be wrong he will receive one reward."[50]I would like to refer to another famous hadith of Mu'adh b. Jabal that the Prophet (peace be on him) endorsed the sayings of Mu'adh that "he will resort to ijtihad to determine a matter if he could not find its answer in the Qur'an and the Sunnah."[51]

It is also reported that how Umar changed his previous view in finger and inheritance case.[52]

Based upon it, a mujtahid (qadi in this case) is not bound to follow another mujtahid and he can change his ijtihad and decide the new case accordingly. Mr. Badi-uz-Zaman Kaikaus v. President of Pakistan the petitioner is an interesting Pakistani case to underscore the use of precedent in Islamic law. The petitioner (B. Z. Kaikaus) was a retired judge of the Supreme Court who moved a writ petition in the Lahore High Court .The petitioner sought a declaration inter alia that the 1973 Constitution of Pakistan itself and the legal system under it were un-Islamic and argued that the doctrine of binding precedent was un-Islamic and the High Court was not bound by an un-Islamic but otherwise binding precedent (the fact that the High Court was bound by the Supreme Court's decisions under Article 189) in Zia ur Rahman v. State 1973).[53] The case was concluded that the Constitution of 1973 was not an un-Islamic text avoiding the discussion on the question of binding precedent.[54]

The most significant point in this regard is that since Article 189, 201, and 203 GG are Constitutional provisions establishing vertical stare decises, the Federal Shariat Court has no jurisdiction to challenge or discuss the question of their repugnancy to Islam. Federal Shariat Court (FSC) hears Shariat petitions related to matters which have a religious implications, or related to appeals against criminal convictions under the Islamic Hudood. Most significantly, FSC is entitled to review and declare void any law repugnant to the principles laid out in

[48] Nyazee, Outlines of Islamic Jurisprudence, 328

[49] Al Quran 4:105

[50] Muhammad, Precedent in Islamic Law 475

[51] Ibid

[52] Ibid, 476

[53] *Zia ur Rahman v. State* PLD 1973 SC 49.

[54] Muhammad, Precedent in Islamic Law, 478

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the Quran and the Sunnah.

A Federal Shariat Court's judgment declaring some clauses of the Protection of Women Act-2006 as "violative of the Constitution," has sparked a constitutional debate on the FSC's powers to rule on the constitutionality of any law. **Protection of Women Act-2006 rejected both previous provision** that required

(i) an adultery victim to produce four eyewitnesses for "the registration of a case with police[55] and

(ii) that the victim women can be convicted on the basis of her complaint.

The FSC, in its judgment, said that "the extent of jurisdiction of the FSC in matters relating to Hudood under Article 203DD is exclusive and pervades the entire spectrum of orders passed or decision given by any criminal court under any law relating to the enforcement of Hudood and no other court is empowered to entertain appeal, revision or reference in such cases. No legislative instrument can control, regulate or amend this jurisdiction which was mandated in Chapter 3A of Part VII of the constitution."[56] The FSC judgment also restored the Hudood laws that require an adultery victim to produce four eyewitnesses for "the registration of a case with police and that complainant can be convicted.The Constitutional expert Barrister Baacha commented on FSC judgment and declared that FSC has exceeded its constitutional mandate and the Supreme Court should take souo moto action on the FSC ruling.[57]

In United Bank Ltd Karachi vs. Grayure Packaging (Pvt) Ltd 2001, Sind High Court decided that the decision of Supreme Court is binding on High courts under the provisions of Art. 189 of the constitution, whereas the order of Federal Shariat Court is also binding under Art 203- GG subject to Arts.203-Dand 203-F of the Constitution.[58] Similarly, in Muhammad Afzaal vs. Sessions Judge Multan 2010 , the Lahore High Court gave judgment that under Art 203-GG ,judgments of the Federal Shariat Court in which statement of law contained in the judgment of the Federal Shariat Court is binding on the High Court and the Courts subordinate to High Court.[59]

Towards Conclusion

In Islamic legal theory, qadi can deviate from his own previous decision and he can change his ijthihad if he thinks that earlier ijthihad concerning the decision was wrong.

In contrast to the Islamic legal system, the decision made in the common law system can be overruled by a subsequent Court or even by a larger Bench of the same Court, however, once it is overruled, it is considered a bad authority and is

[55] The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979, sec 8(b).

[56] Qaiser Butt, Women Protection Act: Top Islamic Court Rules Against Law The Express Tribune Pakistan (23 Dec 2010) https://tribune.com.pk/story/93167/shariat-court-terms-women-protection-act-clauses-repugnant/

[57] ibid

[58] United Bank Ltd Karachi vs. Grayure Packaging (Pvt) Ltd, 2001 YLR 1549 Karachi High Court

[59] Muhammad Afzaal vs. Sessions Judge Multan, 2010 PLD 479 Lahore High Court

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not cited by lawyers to support a point.[60] Lawyers are even warned for citing overruled cases[61] whereas an experienced advocate got his appeal admitted on the basis of an overruled judgment but Chief Justice Mir Khuda Bakhsh Marri of the Baluchistan High Court expressed unhappiness and dissatisfaction with the conduct of the lawyer and reprimanded him not to refer to any overruled case in future. Islamic law presents a contrast to the Western systems of civil and common law not only in its methods of legal reasoning, but in the priority of its sources as well. In Islamic law the earlier the opinion, the better it is. In common law the latest the decision, the better it is and the earlier decision has no value for the case at bar.[62]

Conclusion

The law is developed through the writings of jurists based on the Quran, the Sunna, and consensus, and by using the method of reasoning by analogy to expand on the general principles found therein without any recourse to legislation. Although reforms since the early nineteenth century have introduced Western elements into the legal systems of present-day Islamic countries, Islamic law continues to play a substantive and, perhaps even more significantly, a spiritual role in the legal development of those countries.[63] Likewise, the concept of ijtihad, though, has never fully abandoned but has lost its vitality and cutting edge when the concept of taqlid (strict precedents) became the dominant jurisprudential theme in the middle ages of Islam.[64] For the past two hundred years, however, taqlid has been losing ground and the call for vital ijtihad has won universal approval.

The Constitution becomes merely an administrative document if it fails to fulfill its basic purpose resulting in flawed internal organization. The Pakistan's Constitution seeks to balance out this requirement with its other aspirations of enabling its Muslim citizens in living their lives according to dictates of the Quran and Sunnah. Here the important part to recognize and point to be noted is that the Constitution talks about enabling not enforcing Islam which is harmful and, obviously, needs to be avoided. The fact that the doctrine of precedent restricts judges from undertaking ijtihad on one hand and it somewhat restricts the independence of the judiciary on the other hand. Similarly, the Federal Shariat Court has very limited and exclusive jurisdiction. It has no jurisdiction in constitutional matters as well as procedural laws leaving the question that are the binding precedent under Article 189, 201 and 203 are Islamic or not?

Bibliography

Al, Quran 39:9; 58:11; 4:59; 35:28.

Abu Bakr b. Mas'ud al-Kasanl, The Unprecedented Analytical Arrangement of Islamic Laws, trans. Imran A. K.

Adams ,Sunan , Abu Dawud, Bk 25, Hadith no. 3634 (Trans. Ahmed Hasan).

[60] Muhammad, Precedent in Islamic Law 445-482

[61] *Syed Munawar Ali v. Mehta W. N. Kohli*, 1980 CLC 1561

[62] Muhammad, Precedent in Islamic Law

[63] John Makdisi, "Islamic Law Bibliography" (1986) 78 Law. Libr. J. 103-189

[64] Khan, The Reopening of

Dialogue Social Science Review (DSSR)
www.journalforeducationalresearch.online

ISSN Online: 3007-3154
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DIALOGUE SOCIAL SCIENCE REVIEW

Vol. 3 No. 2 (February) (2025)

Ali ibn Umar al-Dar Qutni, Sunan al-Dar Qutni, Qairo: Dar al-Mahasin, 1966, vol. 4, p. 239.

Darbyshire, '*The English Legal System*' (7th ed. London: Sweet and Maxwell) 178.

Aga Mahomed Jaff er v. Koolsom Beebee (1897), 25 Cal. 9, 496.

Aziz Bano v. Muhammad Ibrahim Husein (1925), 47 All., 823

Bihari , Misra, Bankey, *The Central Administration 1773-1834* (Manchester: Manchester 1959)324

Butt ,Qaiser, Women Protection Act: Top Islamic Court Rules Against Law The Express Tribune Pakistan (23 Dec 2010) https://tribune.com.pk/story/93167/shariat-court-terms-women-protection-act-clauses-repugnant/

Giunchi ,Elisa, The Reinvention of "Sharīʿa" under the British Raj: In Search of Authenticity and Certainty, (November 2010)69, No. 4 The Journal of Asian Studies, 1119-1142

Hallaq ,Wael, Was the Gate of Ijtihad Closed? (1984) 16 Inter. J. Middle East

Hallaq ,Wael B, A History of Islamic Legal Theory: An Introduction to Sunni Usul al Fiqh (Cambridge: Cambridge University Press, 1997; reprint, 1999) 117.

Haneef ,Sayed Sikanadar Shah, Modern Means of Proof: Legal Basis for Its Accommodation in Islamic Law (2006)20 No. 4 , Arab Law Quarterly, pp. 334-364

Jan Mohamed Abdullah Datu and others v. Datu ioffer and others, AIR 1914 Bombay 59

Khan ,Ali, The Reopening of the Islamic Code :The Second Era of Ijtihad accessed online http://ir.stthomas.edu/cgi/viewcontent.cgi?article =1016 &c ontext=ustlj

Kaym ,A., The Jammat Tableegh and the Deobandis, Chap. 12 (2001) accessed online. http://www.ahya.org/tjonline/eng/contents.html

Kugle ,Scott Alan, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia" (May 2001) 35 Modern Asian Studies, 257.

Makdisi, ,John "Islamic Law Bibliography" (1986) 78 Law. Libr. J. 103-189

Merryman, John H. *The Civil Law Tradition*. (Stanford, CA: Stanford University Press 1969) 224

Mohamed ,Shahabuddeen , '*Precedent in the World Court*. (Cambridge: Cambridge University Press . 1996) 43

Muhammad Afzaal vs. Sessions Judge Multan, 2010 PLD 479 Lahore High Court

Munir ,Muhammad, 'Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan , (Winter 2008) Vol. 47, No. 4 Islamic Studies pp. 445-482 472 (Hereafter Muhammad, Precedent in Islamic Law)

Nyazee ,Imran A. K., Outlines of Islamic Jurisprudence, 2nd ed. (Islamabad: Centre for Islamic Law & Legal Heritage, 2002), 349-358.

Opolot, James S. E. '*An Analysis of World Legal Traditions*' (Jonesboro, TN: Pilgrimage Press 1980) 22.

Dialogue Social Science Review (DSSR)
www.journalforeducationalresearch.online

ISSN Online: 3007-3154
ISSN Print: 3007-3146

DIALOGUE SOCIAL SCIENCE REVIEW

Vol. 3 No. 2 (February) (2025)

Powell ,Emilia Justyna and Mitchell, Sara McLaughlin, "The International Court of Justice and the World's Three Legal System" (May., 2007)69 The Journal of Politics, 397-415

Rahman, Fazl ur, 'Islam' (University of Chicago Press 1979)123

Sahih Bukhari, vol. 3, hadith no. 227 (trans. Muhsin Khan).

Sahih Muslim, vol. 2, hadith no. 1885 (trans. Abdul Siddiqi).

Schacht ,Joseph, 'An Introduction to Islamic Law' (1964) 70-71

Shapiro, Martin M, '*Courts: A Comparative and Political Analysis*' (Chicago: University of Chicago Press 1986) 112

Syed Munawar Ali v. Mehta W. N. Kohli, 1980 CLC 1561

Tyabji, Faiz Badruddin, *Principles of Muhammadan Law* (Calcutta: Butterworth 1919) 74

United Bank Ltd Karachi vs. Grayure Packaging (Pvt) Ltd, 2001 YLR 1549 Karachi High Court

Vago, Steven., *Law and Society* (Upper Saddle River,NJ: Pren-tice Hall 2000) 214

Zia ur Rahman v. State PLD 1973 SC 49